**OCBC BANK (MALAYSIA) BHD**

**v.**

**DELIGHTFUL STRENGTH SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S1-24-78-2003]
27 MAY 2004

***CIVIL PROCEDURE:*** *Amendment - Amendment to originating summons and order for sale, application for - Amendment sought to include relief omitted - Principle of functus officio - Rules of the High Court 1980, O. 20 rr. 7 & 11 - Inherent powers of court - Whether applicable*

The plaintiff obtained an order for sale against the defendant in respect of a foreclosure action. However the plaintiff omitted to pray for default interest on the loan granted by the plaintiff to the defendant as provided for under the annexure to the charge. The plaintiff now made an application to include this item by way of amendment to the originating summons ('OS') used to foreclose on the charged property, and to the order for sale.

The issues were: (1) whether the defence of *functus officio* was applicable; (2) whether the amendment could be made under the slip rule of O. 20 r. 11 of the Rules of the High Court 1980 ('RHC') and (3) whether the amendment could be granted under the inherent powers of the court.

**Held (dismissing the application)**

**[1]** The general proposition that the same court that issued the order for sale has no power to alter or vary its own order after it is drawn up and perfected does not apply to any proposed amendment made under the slip rule of O. 20 r. 11 RHC. However, the slip rule under O. 20 r. 11 refers only to an order or judgment. Since the OS was not an order or judgment, such exception to the *functus officio* rule had no application. (p 299 f-h)

**[2]** Application for amendment to an originating summons is permitted under O. 20 r. 7 RHC. However, the plaintiff's OS had been litigated and judgment handed down with all reliefs requested therein addressed, determined and finalised. There was no issue left for consideration. This court had become *functus officio*. (p 300 a-b)

**[3]** Under the slip rule of O. 20 r. 11 RHC amendment to an order or judgment must be confined to clerical mistakes or errors arising in the order or judgment itself from accidental slip or omission. The amendment cannot be expanded to something that is outside this scope. The item on default interest might be a term and condition in the loan agreement between the parties but as it was not prayed for in the OS, it never became an issue before the court. To entertain this would tantamount to a fresh hearing of an entirely new matter which was not what the slip rule intended, and would also be contributing to another exception to the *functus officio* principle which is strongly discouraged. (pp 301 f-h & 302 a)

**[4]** As to the inherent powers of the court to grant amendment, the underlying principle is to enable the court to correct the record so as to make it consistent with the judgment or order which it obviously meant to pronounce. In the present case the record leading to the handing down of the order for sale was consistent with the reliefs sought for in the OS. Every relief requested and set out therein was attended to and pronounced. The claim for default interest was never a part of the record. It was not prayed for in the OS. To allow this to be added by way of an alteration to the order for sale would be contrary to the principle as set out for amendment to order or judgment under the inherent powers of the court. It would also be permitting the plaintiff to introduce indirectly through the backdoor, an item which the plaintiff never asked for in the first place when this legal proceeding was filed in court. (p 302 c-e)

**Case(s) referred to:**

*Arab-Malaysia Finance Bhd v. Malacca Development Corporation Sdn Bhd & Ors* [1997] 3 CLJ 51 HC ***(refd)***

*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC ***(refd)***

*Hock Hua Bank Bhd v. Sahari Murid* [1981] 1 MLJ 143 ***(refd)***

*Malacca Securities Sdn Bhd v. Loke Yu* [2002] 2 MLJ 506 ***(refd)***

*Malayan United Finance Bhd v. Sykt Tiam Choy Moto & Ors* [1983] 1 CLJ 307; [1983] CLJ (Rep) 624 HC ***(refd)***

*Mutual Shipping Corp of New York v. Bayshore Shipping Co of Monrovia The Montan* [1985] 1 All ER 520 ***(refd)***

*Oriental Bank Bhd v. Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810 HC ***(refd)***

*Standard Chartered Bank Malaysia Bhd v. Benjamin KRK Samy & Anor* [2002] 1 CLJ 171 HC ***(refd)***

**Legislation referred to:**
National Land Code, Form 16D
Rules of the High Court 1980, O. 20 rr. 7, 11

*For the plaintiff - SL Goh (PL Lau); M/s Shook Lin & Bok*
*For the defendant - En Gunaseelan; M/s Gunaseelan & Assoc*

*Reported by Usha Thiagarajah*

## JUDGMENT

**James Foong J:**

**Introduction**

This application before me relates to a foreclosure action. When the plaintiff secured from this court the order for sale, default interest on the loan granted by the plaintiff to the defendant as provided for under the annexure to the charge was not requested as a relief in the originating summons to foreclose on the charged property. The plaintiff now seeks by way of encl. 11 to amend: (a) the originating summons and (b) the order for sale to include this item.

**Defence**

The defendant opposes this application primarily on 2 grounds: (a) that this court is *functus officio* after granting the order for sale; (b) that the circumstances of this case does not justify the granting of the proposed amendment to the order for sale under the slip rule of O. 20 r. 11 Rules of the High Court (RHC).

**Analysis**

*(a) Functus Officio*

I shall first deal with the defence of *functus officio.* In respect of the proposed amendment to the order for sale, I am of the view that this defence is unsustainable. The general proposition that the same court that issued the order for sale has no power to alter or vary its own order after it is drawn up and perfected does not apply to any proposed amendment made under the slip rule of O. 20 r. 11 RHC – see the judgment of Chang Min Tat FJ in *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143.

Though an order for sale may be amended under the slip rule without being caught by the principle of *functus officio* but does this exception similarly applies to the plaintiff's proposed amendment to the originating summons?

It is my view that the slip rule under O. 20 r. 11 RHC only refers to order or judgment. Since the originating summons is not an order or judgment, then such exception to the *functus officio* rule has no application.

Not avail of this remedy can the plaintiff then apply to amend the originating summons under other provisions of the law? Application for amendment to an originating summons is of course permitted under O. 20 r. 7 RHC. But in this instance, the originating summons has been litigated and judgment handed down with all reliefs requested therein addressed, determined and finalised. There is no issue left for consideration. This court has become *functus officio*. Any fresh claim, in my view, should either be presented by way of: (a) a new action; or (b) under the same process but only after the order or judgment is set aside; amendment made to the originating process to include this fresh claim; and then have the entire matter litigated once more. Of course, the latter approach in setting aside the order for sale, one would once again encounter the same restriction imposed by the *functus officio* rule, unless, the plaintiff is able to convince the court that the circumstances qualifies for the exceptions (to the *functus officio* rule) as laid out in the Federal Court decision of *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75.

For reasons set out, I disallow the plaintiff's application to amend the originating summons.

With this disposed off, I shall now focus on the proposed amendment to the order for sale under the slip rule. The question here is: whether there is any justification in allowing the plaintiff to succeed in the proposed amendment?

*(b) Slip Rule – Order 20 r. 11 RHC*

Order 20 r. 11 RHC reads:

> Amendment of judgment and order
>
> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

In the case of *Standard Chartered Bank Malaysia Bhd v. Benjamin KRK Samy & Anor.* [2002] 1 CLJ 171, Justice Low Hop Bing has admirably examined a list of leading authorities governing the application of this particular rule in a similar sort of application. In that case the outstanding sum owed by the defendant to the plaintiff under the order for sale was incorrectly stated as RM312,239.93 (despite the fact that this was the amount mentioned in the plaintiff's second affidavit which was used during the hearing of the originating summons). The proposed amendment by the plaintiff is for a much higher figure of over RM1 million, which is listed in statutory notice under Form 16D of the National Land Code 1965 that was served on the defendant. Utilizing O. 20 r. 11 of the RHC, as well as the inherent powers of the court, the learned judge allowed the proposed amendment to the order for sale.

In the course of Justice Low's judgment in the above case, a dictum of Lord Goff LJ in *Mutual Shipping Corp of New York v. Bayshore Shipping Co of Monrovia The Montan* [1985] 1 All ER 520 that there is "no reason why, if a court gives judgment in, for example, a certain sum, and the order is then drawn up and perfected, and it is afterwards discovered that the court has, by accident, miscalculated the figure or omitted an item from it, the error in the order should not be corrected under the slip rule" is highlighted.

In addition to the above, Justice Low in the same case also accepted the proposition of Augustine Paul JC (as he then was) in *Arab-Malaysia Finance Bhd v. Malacca Development Corporation Sdn Bhd & Ors* [1997] 3 CLJ 51 that "the court has an inherent power to correct errors to give a clear expression to the intentions in the judgment or order which has been perfected ... to enable the court to correct record to make it consistent with the judgment or order which it obviously meant to pronounce".

These views of Justice Low were repeated in a latter case of *Malacca Securities Sdn Bhd v. Loke Yu* [2002] 2 MLJ 506 decided by him. There the proposed amendment (which was allowed) is towards the consent order to include a provision that: should the defendant failed to comply with the consent order the plaintiff is entitled to the whole amount claimed.

In another case of *Oriental Bank Berhad v. Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810 Kamalanathan Ratnam J permitted correction under the slip rule to an order for sale that did not mention the auction date in the foreclosure action.

From the array of these cases, one gathers that amendment or correction to the order or judgment could be effected either under the slip rule of O. 20 r. 11 RHC, and/or under the inherent powers granted to the court. But to what extend should these be allowed? Naturally, under the slip rule of O. 20 r. 11 RHC, amendment to order or judgment must be confined to clerical mistakes or errors arising in the order or judgment itself from accidental slip or omission. Surely amendment cannot be expanded to something that is outside this scope. This can be seen in the case of *Malayan United Finance Bhd v. Sykt Tiam Choy Moto & Ors.* [1983] 1 CLJ 307; [1983] CLJ (Rep) 624 where the court refused a proposed amendment to include an order for a particular relief that had been deliberately left out when the order was drawn up and perfected. It is my view that O. 20 r. 11 RHC has limited application and cannot go beyond to matter that is not brought forth as a relief for determination by the court when handing down the order or judgment. As disclosed, in this application before me, this item on default interest is not even prayed for in the plaintiff's originating summons that led to the issuance of the order for sale. This provision for default interest to be charged against the plaintiff may be a term

and condition in the loan agreement between the parties but when it is never requested for at all in the originating summons, it never became an issue before the court. To entertain this would tantamount to a fresh hearing of an entirely new matter which is not what the slip rule is intended for, and would also be contributing to another exception to the *functus officio* principle which is strongly discouraged – see *Badiaddin bin Mohd Mahidin & Anor. v. Arab Malaysian Finance Bhd (supra).*

As to the inherent powers of the court to grant amendment, the underlying principle is to "enable the court to correct the record to make it consistent with the judgment or order which is obviously meant to pronounce" per Augustine Paul JC (as he then was) in *Standard Chartered Bank Malaysia Bhd v. Benjamin KRK Samy & Anor (supra)*. But in the circumstances of this case before me, the record leading to the handing down of the order for sale is consistent with the reliefs sought for in the originating summons; everything is in order as far as the court's record stands. There is nothing inconsistent with any of the matters brought forth in the originating summons. Every relief requested and set out therein was attended to and pronounced. The matter now sought to be introduced by the plaintiff is never a part of the record. It was not prayed for in the originating summons. To allow this to be added by way of an alteration to the order for sale would, in my view, be contrary to the principle as set out for amendment to order or judgment under the inherent powers of the court. Besides, it will be permitting the plaintiff to introduce indirectly, through the backdoor, an item which the plaintiff never asked for in the first place when this legal proceeding was filed in this court.

**Conclusion**

For reasons set out above I hereby dismiss encl. 11 with cost.